FILE COPY

OCT 21 1949

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949
No. 415

JANE GRASSELLI BUZZI

vs.

CESARE PIETRO BUZZI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF

EDWARD E. PETRILLO,
202 Marine Bank Bldg.,
Erie, Pennsylvania,
HARVEY, RIMEL & JOHNSTON,
310 North Main St.,
Santa Ana, California,
Attorneys for Petitioner.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Frank Baumeister, Erie County Representative, Court House, Erie, Pa.

INDEX

	Page
Petition for Writ of Certiorari	1
Statement of the matter involved	1
Statement of jurisdiction	6
Questions presented	6
Reasons for the allowance of writ	7
Conclusion	8
Brief in Support of Petition for Writ of Certiorari :	
Argument	9
Point One: Does service of process by publication give jurisdiction to render a valid decree of annulment of marriage against a non-resident, absent defendant, where the marriage ceremony was not celebrated in the state where the decree of annulment is granted, and where the matrimonial domicile never existed in the state?	9
Point Two: Can a defendant come into court, after a default judgment has been entered against him and after the time for taking an appeal for said judgment has lapsed, when the said judgment is void on the face of the judgment roll for want of jurisdiction of the court?	16
Point Three: Was petitioner, who was a non-resident, absent defendant, deprived of due process of law in violation of the provisions of the 14th Amendment of the Constitution of the United States when the court granted an annulment of his marriage merely by service of process by publication and by so doing deprived him of his property rights under the provisions of the Community Property Laws of the State of California and of the Republic of Italy, besides depriving him of the control and custody of his own daughter?	17

Point Four: Was any form of substituted service, other than personal service, binding upon the petitioner in an annulment case? ... 19

Point Five: Did the trial court violate the provisions of the third article of the Constitution of The United States, as well as the Acts of Congress of the said United States, and the provisions of the treaties between the United States and Italy, in granting an annulment upon the service by publication only, while petitioner was a member of the Diplomatic and Consular Service of Italy at the time of such process? 23

Assignment of Error 28

CITATIONS

CASES:

Berlinsky vs. Berlinsky, 198 N. Y. S. 402 (1923) 13

Bors vs. Preston, 111 U. S. 252 23

Cummington vs. Belchertown, 21 N. E. 435 Mass. (1889) 12

Estin vs. Estin, 334 U. S. 541 9

Gayle vs. Gayle, 192 S. W. (2d) 821 (Kentucky Court of Appeals) (1946) 13, 20

Griffin vs. Dominguez, 9 N. Y. Sup. Court 656 24

Higginson vs. Higginson, 158 NYS 92, 96 Misc. reports 457 26

Kreiger vs. Kreiger, 334 U. S. 555 9

Mayer vs. Mayer, 207 Cal. 685 (1929) 10

Millar vs. Millar, 175 Cal. 797 (1917) 10

Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 565 (1878) .. 17

Pepper vs. Shearer, 26 S. E. 797 (S. Car.) (1897) 13

Sagory vs. Wissman, Fed. Cases No. 12, 217 24

Shafe vs. Shafe, 198 N. E. 826 (1935) 14

Smith vs. The Supreme Lodge Ancient Order of the United Workman, 12 Cal. App. 189 (1909) 17
State of Texas vs. Lewis, 14 Fed. 67 23
Urdaneta vs. Urdaneta, 37 NYS 2nd 601, 179 Mis. 95 .. 26

STATUTES:

Constitution of the United States, Article 4, Sec. 1 .. 16
Constitution of the United States, Fourteenth Amendment 17, 19
Constitution of the State of California, Article I, Sec. 13 17
Constitution of the United States, Article 3 23

TEXTS:

Nelson on Divorce and Annulment (1945, William T. Nelson):
Vol. 2, page 705 11
Vol. 2, page 707 11
Vol. 2, page 721 11

MISCELLANEOUS:

42 Am. Jur. page 73 9
128 A. L. R. 61, 73 ..... 11, 12
35 Am. Jur. pages 229, 230 ..... 11, 12
Civil Code, Sec. 86 14
Civil Code, Sec. 96 15
Civil Code, Sec. 55 15
1 Am. Jur. Sec. 47 page 435 18

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1949
No. .....

Jane Grasselli Buzzi

vs.

Cesare Pietro Buzzi

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Cesare Pietro Buzzi, respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of the State of California entered in this case on July 18, 1949.

STATEMENT OF THE MATTER INVOLVED

Petitioner, Cesare Pietro Buzzi, and respondent, Jane Grasselli Buzzi, were married on May 9th, 1934, in Rome, Italy. At the time of marriage petitioner was and ever since has been and now is a citizen and subject

of Italy, but was at the time of said marriage in the consular services of the Italian Government to represent his country in the United States and, as such, was stationed in the City of Cleveland, Ohio, as consul general of Italy. At the time of said marriage respondent was a citizen and resident of the United States with her place of residence in the City of Cleveland and State of Ohio. After the marriage the parties returned to Cleveland, Ohio, where the petitioner was still stationed as a representative of his Government.

On or about October 30, 1935 the parties moved to Rome, Italy, petitioner having been recalled to Italy, but still remaining in the diplomatic and consular services of that Country.

During the first part of 1937, respondent left petitioner and returned to the United States and filed an action in divorce against the petitioner, who obtained a leave to come to the United States to defend the action and, this return visit resulted in a reconciliation between the petitioner and respondent, and said parties resumed their domicile in Rome, Italy.

During the month of August, 1939, respondent again left petitioner in Rome, Italy, and with the baby daughter returned to the United States. This was after Italy had become involved in the war in Europe and just prior to the breaking of the relations between Italy and the United States. Petitioner, by reason of his connection with the diplomatic services of his Country remained in Europe and never re-entered the United States until March of 1947.

On July 23, 1940, more than Six (6) years after the marriage, respondent filed an action for an annul-

ment of her marriage, in the City of Santa Ana, County of Orange and State of California, upon the alleged ground of fraud, to-wit: that petitioner had represented to respondent that he was a Count, and a member of the Italian nobility, when in fact he was not, and respondent, therefore, was defrauded in that all she got in the bargain was the man with whom she fell in love and consented to marry, but without title. When this action was filed petitioner was not a resident of nor domiciled in or physically present in California, but at all times was a citizen and resident of Italy, domiciled in and physically present on the Continent of Europe, and at no time was the petitioner ever in the United States between May, 1937 and March, 1947.

The Judgment Role of the Superior Court of Orange County, California, affirmatively shows upon its face that petitioner was a non-resident of California, and that there was never any personal service of process upon the petitioner in the State of California, and that the only service of process ever made on petitioner consisted of the publication of summons in a newspaper in Santa Ana, California, and the mailing by Registered Mail of a copy of the Summons and Complaint to Petitioner in Rome, Italy.

The Judgment Roll also shows affirmatively on its face that no general appearance in said action was ever made by petitioner while the proceedings were pending before said Court.

On the 28th day of February, 1941, the Superior Court of the County of Orange, California, granted a Judgment of Annulment of the marriage and further

ordered and decreed that respondent was to have the sole and exclusive custody and control of the minor child of the parties. This Judgment of Annulment was a default Judgment based upon the petitioner's failure to appear or answer to plaintiff's complaint.

During the pendency of the proceedings for annulment petitioner was absolutely unable to return to the United States to defend the action filed by his wife in the State of California for the reason that his Government did not permit him to leave Italy, and also for the reason that he had become a member of the Armistice Commission to prepare the terms of the Armistice between France and Italy. While Petitioner was in France on said mission he was seized by the Germans and interned in a prison camp first in Vittel, France, and then in Buchenwald, Germany, and was not able to return to Italy until May of 1942.

After the close of the war petitioner was finally able to arrange passage and passport to the United States and returned here in 1947.

On May 21, 1948, petitioner filed notice of motion to vacate the default Judgment of annulment and for an Order permitting him to file his proposed verified answer and to defend said annulment action upon its merits. In support of said motion petitioner also filed a memorandum of points and authorities, affidavit of facts excusing delay and laches, and other affidavits showing that extrinsic fraud had been practiced upon the Trial Court by respondent. Said motion to vacate first came before the Trial Court on July 2, 1948. Respondent objected to the Court considering the matter upon the ground that a final judgment had been enter-

ed; that more than one (1) year, in fact over seven (7) years had elapsed since the entry of the final judgment, and that the Trial Court no longer had jurisdiction to entertain the Motion to set aside the Judgment obtained by default. Respondent's objections were overruled. The Motion was heard, argued and finally submitted and on November 1, 1948, the Trial Court made its Order setting aside the defaulted Judgment of annulment and permitted the petitioner to file his answer so that the action could be heard and determined on its merits. The Trial Court ruled that the default judgment of annulment was void upon the face of the Judgment Roll for the reason that, as a matter of law, such action was not one in which jurisdiction over a non-resident, absent defendant, could be secured through substituted service, but was an action *in personam* where jurisdiction could be secured only by personal service within the territory of the Forum. From this Order respondent appealed to the District Court of Appeal, which Court reversed the Judgment of the Superior Court upon the ground that an action for annulment of marriage is a proceeding *in rem,* the same as an action in divorce, and there should be no distinction between the two as to the matter of securing jurisdiction over a non-resident, absent defendant, by service of publication.

On the 10th day of June, 1949, petitioner filed with the Supreme Court of the State of California his petition for review, but said petition was refused on the 18th day of July, 1949.

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under Section 237 (b) and 240 (a) of the Judicial Code and the Rules of Practice and Procedure of the Supreme Court. This petition is filed within Ninety (90) days from the date of the entry of said Judgment in accordance with the rules.

QUESTIONS PRESENTED

1. Does service of process by publication give jurisdiction to render a valid decree of annulment of marriage against a non-resident, absent defendant, where the marriage ceremony was not celebrated in the state where the decree of annulment is granted, and where the matrimonial domicile never existed in that state?

2. Can a defendant come into court after a default judgment has been entered against him after the time for taking an appeal for said judgment has lapsed, when the said judgment is void on the face of the judgment roll for want of jurisdiction of the Court?

3. Was petitioner, who was a non-resident, absent defendant, deprived of due process of law in violation of the provisions of the 14th amendment of the constitution of the United States when the court granted an annulment of his marriage merely by service of

process by publication and by so doing deprived him of his property rights under the provisions of the community property laws of the State of California and of the Republic of Italy, besides depriving him of the control and custody of his own daughter?

4. Was any form of substituted service, other than personal service, binding upon the petitioner in an annulment case?

5. Did the trial court violate the provisions of the third article of the Constitution of the United States, as well as the Acts of Congress of the said United States, and the provisions of the treaties between the United States and Italy in granting an annulment upon the service by publication only, while petitioner was a member of the diplomatic and consular service of Italy at the time of such process?

REASONS FOR THE ALLOWANCES OF WRIT

---

1. The questions presented involve specific rights under the Constitution of the United States and the Articles of Amendment thereto. These rights have been affirmed frequently by this Court as fundamental and the applicability of the provisions of the amendment to the Constitution with respect to the right of due process of law has been often stressed.

2. The questions presented involve also the right of persons in the diplomatic and consular services of their country to be served with process in accordance with the treaties in existence between nations and par-

ticularly between the countries of the parties involved in this litigation.

3. The decision in the present case is in conflict with and contrary to the decisions of a majority of the Courts of the United States.

CONCLUSION

Your petitioner verily believes that this petition presents a case cognizable by this Honorable Court in order to secure uniformity of decisions on the question of service or process in annulment cases among the Courts of the several States of the Union, and under the Constitution and Statutes of the United States and the rules of this Honorable Court.

Wherefore, comes your petitioner, and respectfully prays that a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of California commanding that Court to certify and to send to this Court for its review a full and complete transcription of the Record and all proceedings in said suit, being the case, 4th Civil No. 3887, and entitled: "Jane Grasselli Buzzi, Plaintiff and Appellant, and Cesare Pietro Buzzi, Defendant and Respondent", and that the Judgment of the said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

CESARE PIETRO BUZZI,
By EDWARD E. PETRILLO,
HARVEY, RIMEL & JOHNSTON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

There are five (5) questions submitted in this Petition, two of which involve violations of the provisions of the Constitution of the United States.

POINT ONE:

Does Service of Process by Publication Give Jurisdiction To Render a Valid Decree of Annulment of Marriage Against a Non-Resident, Absent Defendant where the Marriage Ceremony Was Not Celebrated in the State where the Decree of Annulment Is Granted, and where the Matrimonial Domicile Never Existed in that State?

The Action at bar is not governed by the decisions of this Honorable Court in the recent cases of *Estin vs. Estin* (334 U. S. 541) and *Kreiger vs. Kreiger* (334 U. S. 555) for the reason that our present case does not involve an action in divorce, but an action to annul an existing marriage.

Historically, equity acted only in personam. (42 *Am. Jur.* page 73). Of course the statutes have changed the nature of equity actions in some particulars;

but aside from such changes the statement is still true. Annulment is a child of Equity.

> *Nelson on Divorce and Annulment* (1945, William T. Nelson, Vol. 2, p. 705.)

Because of the differences between divorce and annulment, many writers have contended that annulment actions should be brought only in the jurisdiction where the marriage was celebrated. Indeed there is dictum in an opinion of the California Supreme Court to that effect.

> "Since the validity of marriage is generally determined by the law of the State where the marriage took place, there are cogent reasons why annulments should be sought in the tribunals of that State."
>
> *Mayer v. Mayer* (1929), 207 Cal. 685 at 696.

It does not appear that this doctrine has been generally applied as a rule in conflicts of law; but it does point up to the seriousness of a court's applying the rules of law from another jurisdiction in annulling a marriage.

> "It may readily be conceded that a court should not annul a marriage on the ground of fraud except in extreme cases, where the particular fraud goes to the very essence of the marriage relation, and especially is this true where the marriage has been fully consummated and the parties have actually assumed all the mutual rights and duties of the relation. In such a case, considerations of public policy intervene and courts are loath to annul a marriage."
>
> *Millar v. Millar* (1917), 175 Cal. 797 at 803.

Service of summons by publication in an action to annul a marriage is contrary to the statutes of the State of California.

Service by publication is purely statutory in origin, and service under such statutes must be in conformity thereto (*Nelson on Divorce and Annulment*. Vol. 2, p. 707). Such statutes must be followed strictly: (id., Vol. 2, p. 721.)

> "* * * the courts are practically unanimous in holding that such jurisdiction (i.e., where the defendant in an annulment is domiciled outside the territorial jurisdiction of the Court where the action is brought) may not be exercised under a constructive service of process upon the non-resident defendant by publication or personally without the state."
>
> 128 *A. L. R.* 61, at 73.
>
> "Although the jurisdiction of the courts of the domicil of one of the parties to render a decree of annulment of marriage celebrated elsewhere is generally recognized, the view has been taken that in the absence of statute, such jurisdiction may not be exercised under a constructive service of process upon the non-resident defendant by publication or personally without the State. Furthermore, although there is authority to the contrary, it has been held that this is true, notwithstanding a statute expressly authorized constructive service by publication in divorce cases."
>
> 35 *Am. Jur.* pp. 229, 230.

In an annotation entitled "Jurisdiction as between different states, of a suit to Annul Marriage" found in Volume 128 *A. L. R.* 61, the writer says on page 73 under the title "Constructive Service on Non-resident Defendant":

> "* * * the courts are practically unanimous in holding that such jurisdiction (i.e., where one party is domiciled in a state other than that of celebration of marriage) may not be exercised under a constructive service by process upon the non-resident defendant by publication or personally without the State."

The writer further states that the defendant's personal presence within the state of the forum and personal service of the summons therein or a voluntary general appearance are absolutely necessary, and the writer discusses many cases from many jurisdictions.

Again the editor of *American Jurisprudence* in Volume 35, pages 229 and 230 under Section 75, on the subject of marriage, states that the general rule throughout the United States, to which there are very few exceptions, is that in actions for annulment of marriage, the Court cannot obtain jurisdiction over a non-resident defendant by substituted service.

In a suit between two towns relative to the support of a pauper, Massachusetts refused to recognize a decree for annulment in the New York Courts based on service on the defendant in Massachusetts.

> *Cummington v. Belchertown* (1889), 21 N. E. 435 Mass.

In *Pepper v. Shearer* (1897), 26 S.E. 797 (S. Car.), the defendant at all times during the action was a resident of Texas. On Plaintiff's action to annul the marriage, defendant made a special appearance and defeated the action although plaintiff had made good substituted service according to South Carolina Law. The Supreme Court, in affirming, pointed out that the defendant at all times during the action was a resident of Texas, and that an action to annul that contract is in personam, and that, therefore, jurisdiction cannot be acquired by the court over the person of the defendant through substituted service.

In *Berlinsky vs. Berlinsky* (1923), 198 N.Y.S. 402 (New York Supreme Court, Appellate Division) defendant appealed from orders denying his motions to vacate an order for publication of summons and to dismiss the complaint for lack of jurisdiction over the defendant. The decision of the lower court was reversed. At the beginning of the action, defendant was a resident of Maryland. The appellate court pointed out that the power of a court to declare a marriage void is controlled by statute, and that in the absence of statutory authority a court cannot decree an annulment without personal service on the defendant within the state, or his voluntary appearance. Thus, although the court in that case was able to make its decision on statutory grounds, the statement is made that the annulment action was one in personam (198 N.Y.S. at 406).

The most recent case found dealing with this point is *Gayle v. Gayle* (1946), 192 S. W. (2d) 821 (Kentucky Court of Appeals). In the annulment action in which the defendant was a non-resident of the State of Ken-

tucky, plaintiff proceeded by constructive service. The complaint was dismissed, and the Court of Appeals affirmed the holding of the lower court. Logically, the court points out the difference between divorce and annulment. Divorce may be held to be in rem because the marriage status is the thing the court acts on. In annulment, however, the allegations of the petition preclude the existence of the thing or res. If the court should find for the plaintiff, it in effect finds that it had no jurisdiction to act (192 8W (2) at 822). Thus an annulment action is one for a personal judgment.

The Indiana Courts have followed the same line of reasoning:

Plaintiff brought an action to annul his marriage in the Indiana Courts, and served defendant in Alabama by publication. Defendant's motion to quash was overruled, and plaintiff given judgment. The Supreme Court reversed this ruling on the grounds that, although the statute provided for proceedings in annulment as in divorces, there was no specific reference in that section to cases like the one under consideration (*Shafe v. Shafe* (1935), 198 N.E. 826).

That the California legislature regarded annulment actions as in personam is evident from a reading of Section 86 of the Civil Code, and comparing that section with the definition of an action in rem:

> "*Effect of judgment of nullity.* A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them."
>
> *Civil Code,* Sec. 86.

That divorce is regarded differently is evident from a reading of Section 96 of the Civil Code:

> "Effect of Divorce. The effect of a judgment decreeing a divorce, is to restore the parties to the state of unmarried persons".

And marriage is defined thus:

> "What constitutes marriage. Marriage is personal relation arising out of civil contract, to which contract is necessary * * *"
>
> *Civil Code,* Section 55.

It appears that under the Civil Code of California there are no provisions setting forth the procedure for service in any action brought for annulment of marriage, although the code specifically provides how service should be made in actions of divorce.

The majority of the courts of the several states of the United States have held that, in the absence of a specific statutory authorization for service of process by publication on a non-resident in annulment actions, there can be no valid service on a non-resident who does not submit himself to the jurisdiction of the court.

POINT TWO:

Can a Defendant Come into Court, After a Default Judgment Has Been Entered Against Him and After the Time for Taking an Appeal for Said Judgment Has Lapsed, when the Said Judgment Is Void on the Face of the Judgment Roll for Want of Jurisdiction of the Court?

It is obvious that if a judgment is void on its face, the same may be set aside at any time. In the first place a court cannot render a valid judgment when it has no jurisdiction over the person of the defendant, and if the judgment is rendered against him by default, such judgment is void.

The provision of Article 4, Section 1, of the Constitution of the United States that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State is not applicable where the judgment is rendered by the Court of a State which has no jurisdiction over the parties. If a State has no jurisdiction over the defendant, a personal judgment rendered against him by a Court of that State is void, and being void it could be set aside at any time. The mere fact that the defendant had actual knowledge of the action is not sufficient to make the judgment valid.

POINT THREE:

Was Petitioner, Who Was a Non-Resident, Absent Defendant, Deprived of Due Process of Law in Violation of the Provisions of the 14th Amendment of the Constitution of the United States when the Court Granted an Annulment of His Marriage Merely by Service of Process by Publication and by so Doing Deprived Him of His Property Rights under the Provisions of the Community Property Laws of the State of California and of the Republic of Italy, besides Depriving Him of the Control and Custody of His Own Daughter?

The Fourteenth Amendment to the Constitution of the United States provides in part: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

Article I, Section 13 of the Constitution of the State of California provides in part: "No person shall * * * be deprived of life, liberty, or property without due process of law * * *"

"Due Process" means that jurisdiction to render a personal judgment against a non-resident must be obtained by personal service of process on the defendant within the territorial jurisdiction of the State of the forum.

Pennoyer v. Neff (1878), 95 U. S. 714, 24 L. Ed. 565;

Smith v. The Supreme Lodge Ancient Order of the United Workman (1909), 12 Cal. App. 189.

The following statements from American Jurisprudence clarify the application of this rule:

> "* * * Whether a proceeding is in rem or in personam is determined by its nature and purpose and by these only. A proceeding in personam is a proceeding to enforce personal rights, and obligations brought against the person and based on jurisdiction of the person, although it may involve his right to, or the exercise of, specific property, or seek to compel him to control or dispose of it in accordance with the mandate of the court. In a proceeding in personam the court acts upon its jurisdiction over the person. In fact, the chief value of the distinction between actions in this respect is in the determination of the sufficiency of the service of process on the defendant."
>
> 1 *Am. Jur.* (*Actions*), Sec. 47, p. 435.

The Superior Court of Orange County ruled that an action to annul a marriage is an action in personam, but the District Court of Appeal has ruled that it should be considered as being one *in rem,* which decision appears to be in contradiction with the majority of the decisions of the Courts of the United States.

We respectfully submit that an action of annulment of marriage cannot be ruled as being an action in rem for the reason that an annulment destroys all property rights acquired by the aggrieved party through marriage, while a divorce does not so act for the reason that the divorce action does not affect the rights of the individuals, but only their status. Here, in this case, petitioner, as a matter of law, would be

barred from any rights under the community property laws of the State of California where the action of annulment was instituted as well as under the laws of the Kingdom, now Republic, of Italy, where the marriage had taken place. If, therefore, the annulment action deprived petitioner of any property rights, then, without any doubt, the action would be an action in personam and not in rem, and the petitioner would be deprived of property without due process of law in violation of the provisions of the 14th Amendment to the Constitution of the United States.

POINT FOUR:

Was any Form of Substituted Service, other than Personal Service, Binding upon the Petitioner in an Annulment Case?

If the action for annulment of marriage is an action in personam, then it will be useless to discuss the matter further, as it is the general law that any form of substituted service in an action in personam is not binding upon an absent defendant.

The purpose and nature of an action for divorce is to terminate an existing valid status by reason of conduct occurring after the creation of this status. The validity of the marriage and the existence of this status are presupposed and considered by the Court and the law, and may not be questioned. An action for annulment, on the other hand, has a totally different purpose. Annulment is a judicial declaration that no valid mar-

riage ever existed and hence that no matrimonial status ever existed. This declaration is based upon something which happened or existed at or before the marriage ceremony and which rendered the ceremony either void or voidable.

With the exception of the decision of the Superior Court of Appeal of the State of California, and one decision from the Courts of the State of Washington, all the rest of the Courts throughout the United States and Canada, which have passed upon the question, have arrived at the same conclusion, namely: that in the absence of a specific statute authorizing service by publication an action for annulment of marriage is one which is so much in personam, so personal in nature, so much in the nature of an action ex contractu, that personal service upon a non-resident, absent defendant, within the State of the forum, or a general appearance, is an absolute necessity to jurisdiction, and that any judgment based solely on service by publication is completely void. The code of Civil Practice of the State of California does not contain any provision for service relating to actions for annulment of marriage.

The most recent decision outside the State of California is the case of *Gayle vs. Gayle* (301 Ky. 821, 192 S. W. 2nd 821) to which reference has already been made. This case is squarely in point on the facts. The decision is short, concise, and presents the most logical and consistent statement of the law which we have been able to find. After first pointing out that an action in rem, or quasi-in-rem, calls for a judgment upon the status of the subject matter and is binding on the whole

world, while an action in personam calls for a judgment which binds only the parties to the action and their privies, the Court then states:

"In the case of divorce, the marriage status is the thing or res upon which the Court may act. In an action for annulment on the ground the marriage ceremony was void, the very allegations of the petition preclude the existence of the thing or res, in 128 A.L.R. page 63, it is said:

"Moreover, it seems absurd to speak of that state as having created the res of the status, when the very issue in the annulment suit is whether a status was created. The premises of the doctrine which assumes that a status was created by the locus celebrationis, on which the claim for exclusive jurisdiction rests, seems fallacious, because that question will only be determined by the very litigation in which the jurisdiction is assumed, and jurisdiction may be predicated on an issue yet undetermined in the very litigation in which its existence is invoked. If the Court should find that the ceremony effected a valid marriage, while the jurisdictional requirement that the locus celebrationis must have created a res or a status is satisfied by retroactive operation of the court's finding, the purpose of the annulment suit is thereby defeated; but if the court decides that a ceremony did not effect a valid marriage, such a decision is an implied admission by the court that it acted without jurisdiction to begin with. Thus the court's own decision is an implied repudiation of its jurisdiction to entertain the suit. Such is not the situation

in divorce cases which presuppose that a status was validly created and was in existence at the commencement of the divorce suit.

"Since, as we have seen, this is an action for a personal judgment, and the defendant personally has neither been served within the territorial limits of the Court, nor entered his appearance, the chancellor correctly refused to entertain the action."

It must be borne in mind that our present petitioner during the entire proceedings for the annulment of his marriage was outside the limits of the territory of the United States; that the decision of the Circuit Court of Appeal of the State of California was based upon expediency and public policy, but not on the law governing a case of this type. During the proceeding, petitioner was separated from the Court where the proceedings were taking place by Seven thousand five-hundred (7,500) miles of land and ocean, and was unable to leave Italy because of his official duties towards his Country and the unsettled and precarious conditions existing in Europe at that time.

POINT FIVE:

Did the Trial Court Violate the Provisions of the Third Article of the Constitution of The United States, as well as the Acts of Congress of the Said United States, and the Provisions of the Treaties between the United States and Italy, in Granting an Annulment upon the Service by Publication Only, while Petitioner Was a Member of the Diplomatic and Consular Service of Italy at the Time of Such Process?

The second section of the Third Article of the Constitution of the United States declares that "in all cases affecting Ambassadors, other public ministers and Consuls and those in which a state shall be a party, the Supreme Court shall have original jurisdiction". The constitutional grant of original jurisdiction to the Supreme Court of all cases affecting consuls did not prevent Congress from conferring original jurisdiction in such cases on the subordinate courts of the Union.

Bors vs. Preston (111 U. S. 252).

The Act of Congress referred to in the above decision appears to be the act passed on the 24th day of September, 1789, giving jurisdiction to the District Court of the United States, in several cases against consuls and vice-consuls (1 Stat. 76). This Act of Congress was cited in the case of *State of Texas vs. Lewis* (14 Fed. 67), as well as the *Bors vs. Preston* case above referred to.

In an opinion of the Attorney General of the United States (1 Op. Atty. Gen. 406) it was stated by him as follows:

"Consuls are bound to appear only in the Federal Courts; the Constitution and laws, contemplating the responsibility of consuls, having provided these tribunals, in exclusion of the state courts, in which they shall answer".

It also was held that the privilege of bringing suits in the State Courts is not denied foreign consuls, but that no action may be instituted in the State Courts against consuls for the reason that state courts have no jurisdiction to entertain any suits against them.

Sagory vs. Wissman (Fed. Cases No. 12, 217).

In the case of *Griffin vs. Dominguez* (9 N. Y. Sup. Court 656) it was held that it is the duty of the state court, whenever it appears that a foreign consul is defendant, in whatever stage of the proceedings, to confess at once want of jurisdiction and declare its former proceedings void.

In our present case, petitioner, during the time that he had been in the United States, was at all times in the consular services of his country, and that the last place wherein he exercised his official duties was the City of Cleveland, Ohio where he held the position of Consul General of Italy. He held an exequator which was granted to him by the President of the United States in recognition of his official status and when Petitioner was recalled to Italy he remained in the consular and diplomatic service, and was active in the Foreign Office at Rome, Italy. His status was brought to the attention of the Superior Court of Orange County, California, where the annulment proceedings were instituted, through a sworn affidavit of Mrs. Buzzi

which appears on the Judgment Roll earmarked as No. 38593 and which reads as follows:

> "Jane Grasselli Buzzi, being first duly sworn, deposes and says:
>
> That Cesare Pietro Buzzi, defendant in the above entitled action, resides at Rome, Italy; that his place of employment is at Rome, Italy; *his business is that of Consular Service,* and that he is not now in the Military Service of the United States of America."
>
> (See transcribed notes of the Record).

Notice of the fact that the petitioner was in the diplomatic services of Italy appears again on the Judgment Roll of said Court at Number 38593 (See the transcribed notes of the Record): "the last known place of residence of the defendant Cesare Pietro Buzzi, to wit: Sig. Cesare Pietro Buzzi, *Ministero Degli Affari Esteri, Palazzo Chigi, Rome, Italy.*"

The address itself indicated that he was then on duty with the office of the Secretary of Foreign Affairs in Palazzo Chigi, Rome, Italy, which at that time was well known in diplomatic circles and was generally publicized as the official headquarters of the Italian Foreign Office.

It might be argued that matrimonial actions were not contemplated either by the makers of the Constitution or by the legislators, and that there are cases where certain actions were brought in domestic relations courts against consuls on questions of support and separation, but in all these cases it appears that both the husband and the wife were residing in the City and

in the State where the actions were instituted and that, under those circumstances, the Court would have jurisdiction to determine the issue and render a valid judgment (*Urdaneta vs. Urdaneta,* 37 NYS 2nd 601, 179 Mis. 95). However, in the case of *Higginson vs. Higginson,* (158 NYS 92, 96 Misc. reports 457), the Court held that:

> "under the Constitution of the United States, Article 3, Paragraph 2, Subsection 1, 2; Article 3, Paragraph 1, and Article 6, subsection 2, to have no jurisdiction of wife's action for separation, under Code Civ. Proc. N. Y. Paragraph 1762, as against husband, consul for republic of Peru, so that service of summons would be vacated and complaint dismissed".

It must be borne in mind that petitioner in our case was at no time living in the United States when the proceedings were instituted for the annulment of his marriage and, moreover, was unable to appear because of his official position with his Government which facts were well known to his wife, the complainant in the case. The action was instituted and prosecuted in a State Court improperly, because such Court had no jurisdiction over the person of the petitioner and constitutionally could not assume jurisdiction since petitioner was in the consular and diplomatic services of Italy at that time, which fact was established by the wife's own pleadings and the affidavits of service filed in this case.

It is respectfully submitted, therefore, that the rendering of the judgment against petitioner was a violation of the provisions of the Constitution of the

United States and of the Act of Congress which conferred jurisdiction only to the Federal Courts of the United States in all actions against diplomats and consuls.

CONCLUSION

It is further respectfully submitted that the issues involved in this case are of such a fundamental and unusual nature that they call for the exercise by this Court of its supervisory power, and the granting of the requested Writ of Certiorari for the purpose of reviewing the judgment of the Supreme Court of the State of California and for the rendition of such judgment as justice may require.

Respectfully submitted,
EDWARD E. PETRILLO,
Attorney for Petitioner.
HARVEY, RIMEL AND JOHNSTON,
Of Counsel.

ASSIGNMENT OF ERROR

The Supreme Court of the State of California erred in dismissing the petition of Cesare Pietro Buzzi, appellant, and in sustaining the decision of the Superior Court of Appeal, 4th Appellate District, which Court reversed the judgment of the Superior Court of the County of Orange in setting aside the decree of annulment entered by default on February 28, 1941.